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NO. 57891-0-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION I**

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ANDREW JAMES CLAYTON

Respondent,

v.

MARY KAY WILSON,

Appellant.

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APPEAL FROM THE KING COUNTY
SUPERIOR COURT

Cause No. 04-2-14443-4 SEA

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# BRIEF OF RESPONDENT

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KATHRYN GOATER, WSBA# 9648
JAMES D. HAILEY, WSBA #7639
Counsel for Respondent
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

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## I. INTRODUCTION

This case was tried to the bench before the Honorable Theresa Doyle over 10 days of trial that included 12 lay witnesses and 7 expert witnesses generating 1,527 pages of trial transcript. Judge Doyle's careful analysis is demonstrated in her clear and detailed Findings of Fact and Conclusions of Law.

Mrs. Wilson's Statement of Facts ignores the required "fair" presentation of facts. Our Counter-Statement of Facts demonstrates the court's Findings are well-supported by substantial evidence. There is no important fact upon which Judge Doyle relied that does not have substantial support in this record.

In 1991, the Clayton family, who were themselves renters to the Wilsons, entrusted their 8 year-old son to Mr. and Mrs. Wilson for after school and summer yard work at the Wilsons' home and rental properties. Mrs. Wilson managed the family rental business and family finances. The Wilsons owned substantial property, including three rental homes adjacent to their Kenmore home and two additional properties. Instead of properly caring for this young boy in their charge, Mr. Wilson used the yard work as his opportunity to gain Andrew Clayton's trust and friendship and then

evolved the yard work first into massages and then into years of extensive molestation and rape.

Mrs. Wilson attacks the amount of the judgment but misleads this court by ignoring the evidence in this record of the long-term severe impact of the sexual assaults. Her version of the facts minimizes the harm just as it implies she is the chief victim here.

Mrs. Wilson also seeks to preserve as much of her property as possible if the judgment is affirmed.[1] First, she attacks the Judge's reasoned determination that the facts demonstrated Andrew Clayton's work for the community business was essentially connected to the repeated sexual assaults by time, by place, by relationship, and by opportunity. Second, she defends as benign Mr. and Mrs. Wilsons' dramatic transfer of essentially all their property reachable by judgment to Mrs. Wilson within days of Mr. Wilson's arrest in December of 2002.

Judge Doyle's Finding that the sexual assaults occurred in conjunction with the community business employment of Andrew Clayton

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[1] We note that Mrs. Wilson claims the trial court's award of damages "totally subsumed the Wilsons' collective assets." Brief of Appellant at p. 46. This is both inaccurate and misleading. It is inaccurate because even using 2002 assessed real property values, the collective assets of the Wilsons exceeded the judgment. More importantly, Mrs. Wilson is well aware that those assessed values do not come close to the present actual value of those properties. The court may take judicial notice of the rise in property values in the Kenmore area over that span of time, and also note the assessed 2002 values did not take into account any increased value from development potential of contiguous properties.

is based upon hard fact. Not only did Mr. Wilson use the yard work employment as the foundation for his grooming of this young boy, but **every** sexual assault occurred after yard work and before payment. Yard work was why Andrew Clayton was there. Yard work was why he came to know and trust Mr. Wilson. The trust that was violated was the trust in his employer—the Clayton family's trust in Mr. and Mrs. Wilson.

The dramatic transfer of assets was an obvious attempt to place them out of reach of Andrew Clayton and other victims of Mr. Wilson's predatory pedophilia. His arrest occurred December 5, 2002. Mr. Wilson was released from jail on December 9, 2002. On December 11, 2002, Mr. and Mrs. Wilson met with a divorce attorney and told her they had agreed to give essentially all community property to Mrs. Wilson. The property settlement agreement was executed and the property transferred thereby to Mrs. Wilson on December 20, 2002.

Mr. Wilson continued to live on transferred property, do maintenance work, give his paychecks to Mrs. Wilson, and generally have continued close contact and communication with his wife until his guilty plea and sentencing removed him to the penitentiary. Even after he entered prison, Mrs. Wilson continued to manage his finances, do his taxes, visit him in prison, and advocate for his interests.

The underlying judgment is fully supported by the record. We do not ask nor do we believe the court ordered that Mrs. Wilson's separate property be subject to execution of this judgment. It is, however, both right and proper that the community property be fully subject to execution for the harm done here.

## II. COUNTER-STATEMENT OF THE FACTS

### A. Employment And Years Of Abuse.

Andrew and his family moved to a home owned by the Wilsons when Andrew was seven. Report of the Proceedings January 3, 2006 (hereinafter RPIV) 42.[2] At age 8½ Andrew began doing yard work for the Wilsons at their home, and at their various rental properties, for which he was paid. RPIV 45. Andrew was 9 the first time Douglas Wilson physically touched him. Andrew had accompanied Mr. Wilson to the Wilson property in Monroe to assist with yard work. Mr. Wilson gave Andrew a back massage over his clothing after the work was concluded. RPIV 48-9. The next few visits to the Monroe cabin included yard work followed by Wilson massaging Andrew's back over his clothing, and then paying him for the work done. RPIV 50. The physical contact progressed to

[2] See Appendix A which states how each party cites to the Report of Proceedings in its brief.

Wilson having Andrew remove his shirt while Wilson gave him a back rub, and also began occurring at the Wilsons' Kenmore home. RPIV 50. The routine was always the same: work, massage, payment. RPIV 51. At the Kenmore home, Andrew was required to go into the house at the end of the work day to return the toolshed keys and to be paid. RPIV 52.

Mr. Wilson's contacts progressed to requiring Andrew to remove his pants and receive full body massages. He then had Andrew remove his underwear for the massages. Each progression in abuse started at the cabin in Monroe and then also occurred at the Kenmore home, and later at property owned by the Wilsons in Seabeck. RPIV 53, 59. Wilson escalated to arousing Andrew by brushing against Andrew's genitals, and then masturbating Andrew. RPIV 54. Wilson started masturbating Andrew when he was 10½, and began performing oral sex on Andrew when Andrew was age 11 to 12. RPIV 55, FOF 4.[3] Wilson later included removing his own clothing during the molestations, and at age 13 Andrew was required to masturbate Wilson. RPIV 54, 56. On two occasions at the Kenmore house, Wilson made Andrew perform oral sex on Wilson. Andrew gagged both times. RPIV 57.

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[3] The court's Findings of Fact and Conclusions of Law (FOF) are found at CP 844-862. Hereinafter, respondent Clayton will cite to the individual Finding, not the CP, using FOF.

The abuse started when Andrew was ten and continued until he was 16. Wilson molested Andrew in conjunction with Andrew performing yard work, the frequency of which varied depending on the work needed, but occurred continuously from the time Andrew was 10 until age 16. RPIV 58, 104. The sexual assaults only happened in conjunction with Andrew doing yard work for the Wilsons. RPIV 58; RPVI 183.

### B. Andrew Clayton Suffered Severe And Permanent Emotional And Psychological Harm.

Prior to being molested, Andrew was a happy, fun loving child who played with friends and rode bikes. RPIV 42, RPVI 162. During the years of abuse, Andrew experienced an array of negative emotions. He was scared when the assaults began in Monroe, and felt vulnerable and alone. RPIV 61. He told no one what Mr. Wilson was doing, and then felt extreme guilt for not disclosing the abuse to his mother. RPIV 62. He felt bad about lying to his mother, and blamed himself for being abused. RPIV 63. Andrew continues to blame himself. RPIV 64. He is self-conscious and avoids talking about the abuse because to talk about it requires him to relive it. RPIV 67.

Andrew has experienced severe anxiety since disclosing the abuse. He vomits in the mornings, has difficulty concentrating, misses work on occasion, and doesn't want to go to work. RPIV 68, 70. The vomiting

occurs when he is stressed and when he thinks about the abuse. RPIV 71. At times, this occurs every day of the week. RPIV 71. He also worries about vomiting. RPIV 71. The vomiting became so severe that he threw up pieces of skin/tissue that he took to his doctor. RPIV 71-72. Andrew reported frequent vomiting sometimes associated with abdominal pain to his primary physician and was referred for further evaluation to gastroenterologist Dr. Robin Sloane. RPIV 7, 10. He did not tell his doctor about the abuse, because he is afraid to tell anyone and does not want to talk about it. RPIV 70-4. Dr. Sloane examined Andrew, performed an upper endoscopy, and found no obvious physical or medical cause for the vomiting. RPIV 10,12. Dr. Sloane testified Andrew's vomiting was more likely due to trauma than anything else. RPIV 23, 26.

Andrew copes with the abuse by staying busy, and avoiding thinking about it. At times he experiences intrusive thoughts of the abuse at work which impacts his concentration, causes him to make mistakes, and requires him to start over. RPIV 69; RPVI 193-4

Psychologist Dr. Robert Wheeler evaluated Andrew to determine if and how the sexual abuse had affected Andrew. RPIV 96, 101. Dr. Wheeler found Andrew's early development, pre-abuse, was normal, and determined Wilson's abuse of Andrew occurred during the major

formative years when personalities are formed. RPIV 105, 129, 130. Because the abuse started when Andrew was age 9½ to 10, and continued through most of his adolescence, it altered the course of Andrew's development as a person and the development of his personality in harmful ways. RPIV 104-5, 138-9. Andrew is a different person and has different personality characteristics than he would have had had the abuse not occurred. RPIV 104. The years of abuse have rendered him permanently unassertive, lacking self-confidence, and excessively worried and apprehensive. RPIV 141, 143.

Dr. Wheeler diagnosed Andrew as having Axis I mental disorders with both acute and chronic characteristics. The disorders are characterized predominantly by symptoms of anxiety and depression. RPIV 105. The mental disorders are Post Traumatic Stress Disorder, chronic with delayed onset, and Adjustment Disorder with Depressed Mood. RPIV 122. Andrew suppressed and internalized the effects of the abuse throughout his adolescence. Once the abuse was disclosed, the effects became more overt and intense. RPIV 124.

Over the course of the abuse, Andrew became anxious, apprehensive, fearful, and experienced feelings of guilt because he was concealing it from his mother and knew he shouldn't. He felt increasingly

helpless the longer he failed to tell his mother, which increased his feeling of guilt. As he aged, he became increasingly aware of the wrongfulness of the behavior, and unsure of his culpability. His fear of being culpable was a further disincentive to tell his mother; this intensified his feelings of guilt. He also was experiencing a disturbing violation of his body. RPIV 107-8.

The experiences of Andrew's adolescence caused a development of symptoms now expressed as very intense episodes of anxiety. RPIV 108. During the years of abuse he became anxious and apprehensive about meeting with Wilson for fear of being abused. He was anxious about not disclosing the abuse. He worried he felt different than his peers. He felt unable to disclose for fear he would be ridiculed or blamed. He felt hypocritical because he acted like Wilson was OK. RPIV 107-9. Andrew's self-esteem was undermined. He developed increased feelings of his own inadequacy, helplessness, and an inability to cope with his circumstances. RPIV 109.

The psychological testing confirmed Dr. Wheeler's evaluation. Andrew's personality characteristics and symptoms of intense anxiety, and acute depression are present today in marked form. RPIV 110. Today, as a result of the abuse, Andrew worries excessively, is fearful of making

mistakes, is apprehensive, is uncertain about whom he can trust, experiences very unpleasant symptoms of anxiety in the form of gagging, vomiting, and gastrointestinal distress. He experiences depression manifested by sadness, crying, fatigue, and loss of motivation. He views himself as someone who lacks self–efficacy, is not competent, is prone to make mistakes, and fundamentally questions his own feelings of being a worthwhile person. RPIV 110-11. He is impaired in his self-esteem, self-advocacy skills, and sense of being competent and worthwhile. RPIV 111-112. These characteristics are permanent. RPIV 111.

Andrew's mother observed many of the behaviors identified by Dr. Wheeler, including lack of self-esteem, vomiting three mornings a week since the August 2002 disclosure of the abuse, difficulty focusing in school, compulsive cleaning, reluctance to be with friends, and feelings of guilt and shame. RPVI 149, 150, 161, 162-3, 166, 167.

The impairments Andrew now has, as a result of being abused, impact his ability to function in both interpersonal relationships and his vocation. The impact on his vocational functioning includes a lack of self-confidence, fear of making mistakes, difficulty advocating for himself and asserting himself in the world of work. As a plumber, he will struggle. He will have a hard time advocating for himself and being assertive. Because of

the acute symptoms of anxiety, he will have difficulty working. RPIV 114, 184, FOF 20, FOF 22. Dr. Wheeler's opinions that Andrew's vocational functioning have been impacted were corroborated by the testimony of Andrew's father, who indicated he personally observed Andrew being pushed around at work and unable to stand up for himself. RPV 103, FOF 20, FOF 22.

Therapy will not alter the fundamental alteration that has occurred in Andrew's personality, including damaged self-esteem, lowered sense of self-efficacy, propensity to be apprehensive, worry, propensity to make mistakes, and hypersensitivity to onset of anxiety in response to stress. RPIV 190-1.

### C. Mr. And Mrs. Wilson Fraudulently Transferred Substantially All Non-Exempt Assets From Mr. Wilson To Mrs. Wilson Within Weeks Of Mr. Wilson's Arrest.

Mr. Wilson was arrested for sexually assaulting Andrew Clayton on December 5, 2002. RPIII 69-70. He admitted to the police sexually assaulting Andrew, and also to Mrs. Wilson when she visited him in the King County Jail on December 7, 2002. RPIII 68; RPVIII 166; FOF 8. At that time, Mr. Wilson also told Mrs. Wilson that there were additional victims. RPIX 124-125; FOF 8.

Mr. Wilson was released from custody on December 9, 2002 and on returning to the family home that evening told Mrs. Wilson about molesting other minors in addition to Andrew. RPVIII 169; RPIX 126; FOF 9. The Wilsons agreed to dissolve their marriage and Mr. Wilson agreed that Mrs. Wilson would get all their assets. RPVII 42-43; RPVIII 172-173; RPIX 126-127; FOF 9.

Mrs. Wilson contacted Victoria Smith, a divorce attorney, on December 10, 2002 and scheduled an appointment for the next day to initiate an agreed dissolution of the Wilsons' marriage. RPVIII 174; FOF 10. Prior to the execution of the property settlement agreement, both Mr. and Mrs. Wilson knew that Andrew Clayton, and perhaps other victims of Mr. Wilson's past child sex abuse, had claims for damages from that abuse. RPIX 119-124; FOF 30.

Ms. Smith worked the ensuing weekend and prepared a property settlement agreement in accordance with the decisions reached at the December 11th meeting. RPV 143; FOF 12. Mrs. and Mr. Wilson, respectively, signed the property settlement agreement on December 19 and 20, 2002. RPV 142; FOF 12. The transfer of the community interest in the Wilsons' property from Mr. Wilson to Mrs. Wilson was accomplished

through the execution of their property settlement agreement on or about December 20, 2002. RPV 144-145; FOF 26; Trial Exhibit 13.

The transfer of community, personal and real property through the property settlement agreement was a transfer of substantially all of Mr. Wilson's personal and real property community assets to Mrs. Wilson. RPVII 10; RPIX 128; FOF 31. Mrs. Wilson's own expert accountant, Roland Nelson, determined 98% of the non-exempt personal and real community property was distributed to Mrs. Wilson. RPIX 43; FOF 31. Mabry DeBuys is a family law attorney who has handled over 750 dissolution cases with total assets at or exceeding $2,000,000. RPIX 210; FOF 34. Ms. DeBuys testified that the property division here was very skewed and not fair and equitable. RPIX 212; FOF 34.

After the property was transferred, Mr. Wilson continued to live on one of the transferred properties – Seabeck property – without paying rent and with no express rental agreement. RPIX 96; FOF 28. He also continued to maintain all of the transferred properties without compensation from Mrs. Wilson until his incarceration. RPVII 11, 66; FOF 28. Mrs. Wilson prepared Mr. Wilson's 2003 income tax return, as she had always done. RPVIII 91; RPIX 92; FOF 28. She spoke at the sentencing hearing, asking for a reduced sentence. RPIX 105-106; 108-109; FOF 28. She visited Mr. Wilson in

prison approximately monthly. RPIX 138; FOF 28. She asked the Department of Corrections to transfer him to Monroe to be closer to the family. RPIX 137; FOF 28.

After the property was transferred, Mr. Wilson gave Mrs. Wilson his 2003 earnings amounting to $92,000 despite there being no requirement for doing so under their property settlement agreement. RPVIII 188; FOF 29. Mrs. Wilson returned a small amount of money to Mr. Wilson by paying his bills and providing him with groceries and gas money. RPVIII 188; RPIX 96-97; FOF 29. Mrs. Wilson retained the remaining funds in an account available for her own use. RPIX 97; FOF 29. She has used these funds for living expenses since that time. RPIX 97; FOF 29.

## III. ARGUMENT[4]

### A. Joint and Several Liability of Mrs. Wilson Allows Recovery Only Against Her Community Property Held During the Marriage.

Mrs. Wilson begins her argument by claiming she cannot be held jointly responsible for her husband's intentional tort because that liability is limited both by statute and agency law.[5] This argument appears to be

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[4] There was some difficulty in crafting this Response because the specific Findings of Fact and Conclusions of Law at issue for each argument were not always identified in Mrs. Wilson's opening brief.

[5] Brief of Appellant, III(A)(2.), p. 18.

directed at Conclusions of Law Nos. 4 and 8 and out of concern that her separate property which was not formerly community property is reachable by this judgment.

Conclusion of Law No. 4 states:

> 4. The marital community of Douglas and Mary Kay Wilson is liable to plaintiff for the sexual abuse perpetrated by Douglas Wilson. *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953)(community was liable for the husband's molestation of a child in the couple's paid care; the tort occurred in the management of a community enterprise; see H. Cross, The Community Property Law in Washington, 61 Wash.L.Rev. 13, 139 (1986).

Conclusion of Law No. 8 states:

> 8. Judgment should be entered for Plaintiff against Defendant Mary Kay Wilson as a joint and several obligation with Defendant Douglas Wilson's Judgment as set forth above in Conclusion of Law 7, in the total of the amounts stated in Conclusion of Law 7.

Mrs. Wilson appears to be concerned that, by using the phrase "joint and several obligation" in Conclusion of Law No. 8, Judge Doyle was ordering that Mrs. Wilson's separate property be subject to execution. Given that Conclusion of Law No. 4 is the only conclusion finding liability against Mrs. Wilson, Mrs. Wilson's concern is unfounded.

RCW 26.16.190 protects the separate property of a spouse from recovery except in cases where there would be joint responsibility if the marriage did not exist. Here, as to Mrs. Wilson, only liability of the

marital community is specified. Therefore, the community property of the marriage and Mr. Wilson's separate property is subject to recovery.[6]

Mrs. Wilson goes further, however, and argues:

> "Here, there is no joint responsibility for Doug's intentional torts. Joint responsibility can only occur when two individuals act in concert or vicariously when an agent acts for a principal."[7]

Where the marital community is liable for a tort, all community property is available to satisfy the recovery on a judgment. *De Elche v. Jacobsen*, 95 Wn.2d 237, 245 (1980). The community and the tortfeasor spouse are jointly and severally liable for the judgment. *Id.* If, however, Mrs. Wilson is only arguing that her separate property held prior to the property settlement agreement and dissolution cannot be reached by this judgment, we agree.

Similarly confusing is Mrs. Wilson's argument that she is not "vicariously liable" for the intentional torts of her husband, referencing agency law and management of the business.[8] If Mrs. Wilson is again

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[6] Mrs. Wilson also argues she was not an "active tortfeasor". Brief of Appellant, III(A)(3). If by this she means her liability for the judgment is limited to liability flowing from her being part of the marital community, then she is correct. This limitation, however, only applies to the limitation of RCW 26.16.190 that prevents recovery against property that was her separate property during the marriage.

[7] Brief of Appellant, III(A)(2) at p. 18.

[8] Brief of Appellant, III(A)(4) and (5), p. 19-21.

only arguing that her separate property during the marriage should not be subject to recovery for this judgment, we agree.

## B. The Marital Community Was Appropriately Held Liable For The Intentional Torts Committed By Mr. Wilson.

### 1. Nature of Issue, Relevant Conclusion of Law and Findings of Fact, and Standard of Review.

Mrs. Wilson argues the community is not liable because Mr. Wilson's acts "did not advance the community's interests" and he "did not act within the scope of his authority."[9]

This does not accurately state the two-pronged inquiry necessary to determine community liability. Rather, the test is whether these were torts done in the management of community business **or** for the benefit of the community. As indicated in the previous section, such torts are community torts with the community and the tortfeasor separately liable. *deElche v. Jacobsen*, *supra* at 245.

At issue is Conclusion of Law No. 4 and the Findings of Fact from which that Conclusion flows.[10] Conclusion of Law No. 4 holds the marital community of Douglas and Mary Kay Wilson liable for the sexual abuse perpetrated by Douglas Wilson. The Findings of Fact made by the trial

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[9] Brief of Appellant, III(B), p. 21.

[10] In our view, Findings of Fact Nos. 4, 5, 6, 24, and 25 all support Conclusion of Law No. 4.

court are critical to the evaluation of this issue because the question of liability of the marital community is essentially a question of fact.

Findings of Fact are reviewed to determine if they are supported by substantial evidence. Conclusions of law are reviewed to determine if they are supported by the Findings of Fact. *Goodman v. Darden, Doman & Stafford Assocs.,* 100 Wash.2d 476, 670 P.2d 648 (1983); *Nichols Hills Bank v. McCool,* 104 Wash.2d 78, 82, 701 P.2d 1114 (1985); *Ridgeview Props. v. Starbuck,* 96 Wash.2d 716, 719, 638 P.2d 1231 (1982);*Willener v. Sweeting*, 107 Wash.2d 388, 730 P.2d 45 (1986). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. *Woodruff v. McClellan,* 95 Wash.2d 394, 622 P.2d 1268 (1980). A finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact. *Golberg v. Sanglier,* 96 Wash.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982). *Willener* at 394.[11]

We have shown Findings of Fact Nos. 4, 5, 6, 24, and 25 are well-supported in our Counter-Statement of the Facts above. The *de novo* review of Conclusion of Law No. 4 therefore is limited to whether the court's Conclusion is supported by those Findings.

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[11] Unchallenged findings become verities on appeal. *Davis v. Department of Labor and Indus.,* 94 Wash.2d 119, 123, 615 P.2d 1279 (1980).

### 2. *deElche* And Other Washington Case Law Permits A Finding Of Community Liability Under These Facts.

The Court in *deElche v. Jacobsen*, *supra*, was concerned with the general approach to community liability and the recovery of victims for torts committed by a spouse. The court modified the remedy for such torts where the community was not implicated in order to reduce the injustice to tort victims from inability to access any of the community property for their recovery. *Id.* The change created by *deElche* allowed a victim of a spousal tort to reach half the community assets to satisfy their judgment where the community was not otherwise liable.[12] That decision, however, did not alter the test for community liability for a spousal tort, and it is that test that the trial court used in reaching Conclusion of Law No. 4.

Before and after *deElche*, community liability for a spousal tort exists where there is a finding that the tort either was committed for the benefit of the community **or** committed in the management of the community business. *Id.* The latter was the basis for liability here.

Mrs. Wilson repeatedly emphasizes that she was an innocent spouse, but the non-tortfeasor spouse is necessarily innocent when evaluates liability under the *deElche* criteria. Community liability exists

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[12] A spousal-tort victim where the community is not liable is required to first exhaust the tortfeasor spouse's separate property before proceeding to execute on half of the

under such circumstances even though the non-tortfeasor spouse is innocent.

Mrs. Wilson emphasizes that Mr. Wilson committed these acts to gratify his own pleasure, but the test is not only whether the act was performed for the benefit of the community. *deElche*, *supra* at p. 245-246 states clearly:

> "Torts which can properly be said to be done in the management of community business or for the benefit of the community will remain community torts with the community and the tort-feasor liable....For torts not in the management of community business or for its benefit, such as the tort in the present case, the separate property of the tort-feasor should be primarily liable..."

We have provided references in the record supporting the trial court's Findings of Fact supporting this Conclusion of Law. §II(A) *infra*, at pp. 4-6. This is not a simple sexual assault occurring outside a marriage. The victim here was placed in the care and control of Mr. and Mrs. Wilson for years, beginning at 8 years old. The grooming of his trust in Mr. Wilson occurred completely within the context of the employment for the community rental property business. When massages began the actual molestation, they were given by Mr. Wilson under his authority as employer of his young worker for muscle relief from the hard work.

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personal, then half of the real property. Id.. *See also Keene v. Edie*, 131 Wn.2d 822; 935 P.2d 588 (1997).

Every molestation and rape occurred when Andrew Clayton was there for performance of yard work and occurred before he was paid for that work. There was a proper factual basis for Judge Doyle determining the torts occurred in the management of the community business.

Mrs. Wilson is incorrect when she asserts this issue is only a legal issue reviewed *de novo*. Findings of Fact must be upheld if supported by substantial evidence. This includes the trial court's Finding that the torts occurred "in the course of managing the community property of the Wilsons." FOF 24. Determination of whether an act occurred within the course and scope of employment is a question of fact for the trier of fact. *Dickinson v. Edwards*, 105 Wn.2d 457, 466-467 (Wash. 1986); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963).

*LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953) is the closest fact pattern in Washington cases addressing community liability for spousal sex abuse torts. *LaFramboise* involved an appeal from a jury determination that the tort had occurred while the 6 year old child was under the care and custody of the community. *Id.* at 199. There, the appellant argued that the "secret and concealed" molestation could not have been within the course and scope of the husband's employment by the community. *Id.*

The court noted that the act constituting the wrong resulted in liability if the wrong either (1) results or is intended to result in a benefit to the community or (2) is committed in the prosecution of the business of the community. *Id.* at 200. A critical factor for the court in finding the liability appropriate under the second alternative was that the child was young enough that everything done to her while in their custody was a part of her care for which the community was liable. *Id.*

The same factors are present here even though this was employment rather than pure childcare. Mrs. Wilson cannot reasonably claim this young boy was not in both their care and control when he came over to perform yard work at their home and on their various properties. The abuse of that care creates community liability.

Mrs. Wilson suggests that *deElche* overruled *LaFramboise*, but it did not. In fact, in the seminal law review article written on this subject by H. Cross, The Community Property Law in Washington, 61 Wash.L.Rev. 13, 139 (1986), he analyzed pre-*deElche* cases specifically to determine whether they likely would continue to be decided similarly under the approach set forth in *deElche*. He concluded community liability probably would still be found under the facts of *LaFramboise*:

> "*LaFramboise* involved indecent liberties taken during the care of a minor child; the reasoning that there was a

> community enterprise being conducted during which the tort occurred probably leaves the community liability intact."…. at p. 139

Other cases cited by Mrs. Wilson are readily distinguishable from the facts here. For example, Mrs. Wilson cites *Francom v. Costco*, 98 Wn.App. 845, 991 P.2d 1182 (2000), but that case did not involve employment of minor. It also did not involve a "community business". Rather, it was a sexual harassment case involving adults where the only connection between the tortfeasor's actions and the marital community were the tortfeasor's earnings.

Mrs. Wilson also relies upon *Farman v. Farman*, 25 Wn.App. 896, 611 P.2d 1314 (1980), but that case specifically distinguishes itself from *LaFramboise.* In *Farman*, there was no compensation to the community, and the court regarded that as a critical distinction from *LaFramboise*:

> "3 Also distinguishable is *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953), cited by plaintiff, in which the community was held liable for the husband's taking indecent liberties with a foster child. The family had been paid to care for the child; hence, the husband's tort was committed in connection with an activity by which community funds were earned."

*Farman v. Farman*, 25 Wn. App. 896, 903 (1980)

The vicarious liability and *respondeat superior* cases are further distinguishable from the present fact because they do not involve high level

managers of the employer. Liability is automatically imputed to the employer "if an owner, manager, partner, or corporate officer personally participate[d]" in creating the hostile work environment. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407 (1985).[13]

Judge Doyle's Conclusion of Law No. 4 is squarely based upon her Findings and the *deElche* alternative basis for community liability.

### C. The Transfer Of Substantially All Of The Wilson Community Assets To Mrs. Wilson Was An Attempt To Avoid Creditors And Was Fraudulent.

#### 1. Summary Of Fraudulent Transfer Issues And Identification Of Applicable Conclusions Of Law And Findings Of Fact.

Judge Doyle concluded Mr. and Mrs. Wilson engaged in a fraudulent transfer of their assets to Mrs. Wilson in an attempt to defraud creditors, and specifically to defraud Andrew Clayton. She concluded there were four separate bases for holding the transfers fraudulent, namely:[14]

1. Actual Fraud: Transfers Fraudulent As To Present and Future Creditors § 19.40.041(a)(1). Conclusions of Law Nos. 11 and 12.

2. Conclusive Common Law Fraud: Spousal Fraudulent Transfer. Conclusions of Law Nos. 13, 14, and 15.

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[13] *Glascow* is a sexual harassment case, just as is *Francom* referred to above and relied upon by Mrs. Wilson.

[14] The Findings of Fact most relevant to these Conclusions include FOF 8, 9, 10, 12, 26, 28, 29, 31, 34, 36, and 37. The support for these Findings in the record is set forth in §II(C) *infra* in our Counter-Statement of Facts.

3. Constructive Fraud as to Present Creditors under §19.40.051(a). Conclusions of Law Nos. 17, 18, 19, 20, 21, 22, and 23.

4. Constructive Fraud as To Present and Future Creditors Under 23 §19.40.041(a)(2)—Conclusion of Law No. 24.

Each of the above Conclusions separately voids the transfer of the community property as it relates to Andrew Clayton's recovery of this judgment. We will address each in turn.

### 2. Transfers Between Husband And Wife Are Based On A Different Standard And Therefore Have A Different Standard Of Review.

Fraudulent transfer claims by a third party creditor against a husband and wife differ from ordinary fraudulent transfer claims because of RCW 26.16.210 and because of pre-Uniform Fraudulent Transfer Act (hereinafter UFTA) law that supplements the UFTA. The former statute changes the burden of proof for any case arising out of a question of good faith in the transaction between husband and wife. The statute places the burden on the party *asserting* good faith to show the transaction was made in good faith by clear, cogent and convincing evidence:

> **RCW 26.16.210. Burden of proof in transactions between husband and wife.**
>
> "In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

This greater burden on husband and wife to justify property transfers under certain specific circumstances also affects the proof necessary under the UFTA.

A specific statute takes precedence over language of a more general statute such as the UFTA. *In re Estate of Black*, 153 wn. 2d 152, 164, 102 P.3d 796, (2004) sets out a helpful summary of statutory construction rules applied where there is a specific statute that relates to the subject matter of a more general statute:

> "At the outset, we must determine which statutes apply to this case. We decide issues of statutory construction de novo. *In re Estate of Baird*, 131 Wash.2d 514, 518, 933 P.2d 1031 (1997). Statutes relating to the same subject are construed together and, in " 'ascertaining legislative purpose ... are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves.' " *Hallauer v. Spectrum Props., Inc.*, 143 Wash.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84 Wash.2d 645, 650, 529 P.2d 453 (1974). When more than one statute applies, the specific statute will supersede the general statute. *See Hallauer*, 143 Wash.2d at 146, 18 P.3d 540 (stating that when statutes conflict the specific statute supersedes the general statute); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wash.2d 621, 630, 869 P.2d 1034 (1994)."

**D. Actual Fraud: Transfers Fraudulent As To Present And Future Creditors § 19.40.041(A)(1).**

The specific Conclusions of Law relevant to Actual Fraud under the UFTA are:

> 11. A property settlement agreement between husband and wife fixing the character of their respective interests is governed by RCW 26.16.210. Thus, the burden of proof of showing the good faith of the conveyances agreed to in that property settlement agreement under the UFTA actual fraud provision is on Mr. and Mrs. Wilson. *See Jones v. Jones,* 56 Wn.2d 328, 333, 353 P.2d 441 (1960).
>
> 12. Considering all of the factors enumerated in § 19.40.041(b), the Court concludes that Mr. and Mrs. Wilson did not sustain their burden of proof of showing the good faith of the conveyances included in their property settlement agreement.

**1. Standard of Review.**

RCW 19.40.041(a)(1) addresses transfers made with the "actual intent to hinder, delay, or defraud any creditor of the debtor...". RCW 19.40.041(a)(1). Such a claim clearly comes under RCW 26.16.210 when involving a transfer between husband and wife.[15] In *Jones v. Jones*, 56 Wn.2d. 328, 333, 353 P.2d 441 (1960), the court held that claims related to property settlement agreements [PSA] are subject to this statute:

> "The trial court was correct in applying RCW 26.16.210 to the case at bar.
>
> A property settlement agreement between husband and wife fixing the character of their respective interests is governed by this statute. In re *Madden's Estate*, 176 Wash. 51, 28 P. (2d) 280 (1934). Thus, the burden of proof of showing the good faith of the conveyances herein was

[15] *Davison v. Hewitt, supra,* applied the predecessor statute to 26.16.210 to an asset transfer between husband and wife, confirming it was their burden to prove good faith, and finding that since the facts showed the transfer to have been conclusively fraudulent, they had failed to meet that burden.

correctly placed upon [the wife to whom property was transferred]."

The holding in *Jones* is consistent with the plain words of RCW 26.16.210. That statute expressly states it applies to all fraud claims: "***In every case***, where any question arises as to the good faith of any transaction between husband and wife... the burden of proof shall be upon the party asserting the good faith." [emphasis ours]

### 2. The Property Settlement Agreement Was Operative And Effectively Transferred the Community Property.[16]

Mrs. Wilson claims the PSA was not operative when executed and did not effect a transfer of the properties. This claim flies in the face of the express language of the PSA. *Jones* found similar PSA language created an independent contract fixing the character of assets and subjecting it to scrutiny under RCW 26.16.210. *Jones, supra* at 336.

*Jones* looked to the language of the PSA to determine if it constituted an independent agreement. For example, the decision noted the agreement was based upon consideration, by its terms became

[16] We believe the argument that the PSA was not operative because it "would merge into a dissolution decree" is being raised for the first time on appeal. This would be adequate reason to reject this argument, but the language of the PSA itself is so clear that it is independently operative that we anticipate the court will have no difficulty rejecting the argument on its merits.

effective on execution, and did not condition this effective date on any other event such as the entering of a decree of dissolution. *Id.* at 336-337.

The PSA here has all of the language necessary to make it an independent contract effective on the date of execution, i.e. December 20, 2002.[17] The PSA specifically declared in paragraph 1.13 that "...it is the intention of the parties that this Agreement retain its status independently as a contract between the parties, each spouse to enforce their rights as they arise from this Agreement by contract law as well as those remedies available for the enforcement of judgments and dissolution law including the use of contempt power of the Court. It is understood and agreed by the parties that this contract shall be final and binding upon execution by both parties whether or not a Decree of Dissolution is obtained....". Trial Exhibit 13.

The PSA in paragraph 2.1 also specifies that Mr. and Mrs. Wilson released all interest in the property being transferred by the agreement to the other party. *Id.* The agreement specifies in paragraph 1.14 that there the "mutual promises and covenants" constituted consideration for the rights received and relinquished under the agreement.

[17] Trial Exhibit 13, Property Settlement Agreement between Mr. and Mrs. Wilson.

Mrs. Wilson claims the *Jones* court "went to great lengths to emphasize the Nevada dissolution decree was void" before finding the PSA was operative. This is simply not correct. The opinion actually held that the "validity of the Nevada decree is, in our opinion, immaterial." *Jones*, *supra* at 336. The court continued that this immateriality was a result of the language in the PSA establishing it as an independent and effective transfer of property. *Id* at 336-337. Such language is mirrored in the Wilson PSA.

### 3. The Wilsons Had The Burden Of Proof To Show The Transfer Was Made In Good Faith.

Mrs. Wilson argues that RCW 26.16.210 only comes into play after the plaintiff proves through "clear and satisfactory" evidence that the transfer was fraudulent. This claim contravenes the express language of RCW 26.16.210.

> "In every case, where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

The burden of proof "shall be upon the party asserting good faith" in the transaction between husband and wife.

Mrs. Wilson claims that following the express directive of RCW 26.16.210 renders RCW 19.40.081(a) "meaningless" because the latter section provides for a defense to actual fraud by a showing of good faith.

As indicated previously, rules of statutory construction apply the more specific statute over the general statute when there is a question of which statute applies. *In re Estate of Black, supra.* Furthermore, RCW 26.16.210 is unambiguous in its application to all transfers between husband and wife under the conditions present in the Wilson transfer. Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000). *State v. Roggenkamp*, 153 Wn.2d 614, 621 (2005).

**4. Circumstantial Evidence Of Fraudulent Transfer.**

Judge Doyle found Mr. and Mrs. Wilson had not met their burden of proving the transfer of assets agreed to in the PSA was made in good faith. There was a sound basis for this holding, whether one considers it a Finding of Fact or a Conclusion of Law.

The overriding attributes of the PSA were: (1) the transfer of 98% of non-exempt assets from Mr. Wilson to Mrs. Wilson and (2) the speed with which the PSA was drawn up and executed.

The first attribute alone is evidence of bad faith, particularly when it was obvious that the transfer would render Mr. Wilson insolvent to his likely sex abuse victim creditors. The second is equally damning, particularly given that rushing to execute the PSA would have no impact on speeding up the decree of dissolution.

When one combines these two facts with the surrounding circumstances, the picture becomes clear and convincing—far beyond the required standard here. If the rush to transfer property was the result of Mrs. Wilson's disgust with her husband's behavior and her desire to be rid of him, how does that square with the husband's continuing to live on the Seabeck property, his continuing to maintain all of the properties, his continuing to give his paychecks to his wife, his staying over at their Kenmore residence on occasion, etc.?

Mrs. Wilson did not prove she received this property in good faith.

**5. Multiple Factors Support a Finding of Actual Fraud.**

Even if RCW 26.16.210 did not apply to this transfer of assets and Andrew Clayton had been required to prove Actual Fraud by clear and satisfactory evidence, the Findings of Fact support the holding of Actual Fraud. Of the statutory factors the court may consider in determining actual intent set forth in RCW 19.40.041(b) the following provide strong

evidence of actual intent to transfer assets out of the reach of potential creditors:

1. The transfer or obligation was to an insider;

The transfer from a husband to wife is a transfer to an insider. [18]

2. The debtor retained possession or control of the property transferred after the transfer;

Mr. and Mrs. Wilson continued to jointly maintain and manage the community property until he was incarcerated.

4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

Both Mr. and Mrs. Wilson were aware of potential claims and made the transfers under the threat of such suits.

5. The transfer was of substantially all the debtor's assets;

In evaluating the value of property distributed to Mr. Wilson in the property settlement agreement, value is measured by assets reachable by potential creditors:

> Value is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility form a creditor's viewpoint does not satisfy the statutory definition.

[18] RCW 19.40.011(7)(A), 19.40.011 (11).

*Clearwater v. Skyline Construction Co., Inc.*, 67 Wn. App. 305, 322, 835 P.2d 257 (1992), Uniform Fraudulent Transfer Act §3 comment, 7A U.L.A. 650 (1984).

Mrs. Wilson's own expert opined that the property settlement agreement transferred 98% of the non-exempt assets to her. Judge Doyle reasonably concluded that this was a transfer of substantially all of Mr. Wilson's assets. FOF 31.

> 8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

Here too, "value" is determined from the viewpoint of the creditor. No assignment of error was taken as to Conclusion of Law No. 19. That Conclusion states:

> 19. "Reasonably equivalent value" must be determined from a creditor's viewpoint and therefore only includes assets potentially reachable by creditors.

Mrs. Wilson claims this factor is the most significant in her favor and even argues it is dispositive on the question of both actual and constructive fraud.

However, Mrs. Wilson's attempt to characterize Mr. Wilson's receipt of 2% of the non-exempt assets as meeting the "reasonably

equivalent value" standard strains common sense and directly contradicts well-supported Findings of Fact in this matter.

There is no conflict presented in this case between the UFTA and Washington law relating to dissolution. This matter involves a property transfer creating insolvency in one spouse in the face of known present creditors. Either the transfer of assets was made in good faith or it was not. If it was not, the transfer cannot defeat the claim of a creditor such as Andrew Clayton. The facts show the transfer was not in good faith and that Mr. Wilson did not receive "reasonably equivalent value" as found by Judge Doyle.

Mr. Wilson retained less than 2% of the non-exempt personal and real property assets. FOF 31. Mrs. Wilson suggests that her "waiver of maintenance" provided the reasonably equivalent value to Mr. Wilson. The record does not support such an assertion.

Instead, the record provides substantial evidence that Mr. Wilson did not likely have significant future earning power. He was going to jail. He was 62 years old.

The trial court found that a reasonable creditor would have concluded that Mr. Wilson likely was facing considerable prison time for his criminal actions and that the Wilsons were aware of this. The court further

found that a reasonable creditor would have found Mr. Wilson's likely future earning potential to be extremely limited, considering his advanced age upon release from any prison sentence, and his failing vision. FOF 36.

Judge Doyle further found that any value Mr. Wilson received from Mrs. Wilson's waiver of maintenance under the property settlement agreement was not reasonably equivalent to the value of the assets Mr. Wilson transferred. FOF 37.

Both Findings are supported by substantial evidence.

Mrs. Wilson claims to show calculations based upon spreadsheet data that makes the 98-2 split (90/10 if one considers all property, including exempt property) look far more reasonable. However, the question of the division of assets between Mr. and Mrs. Wilson is a pure question of fact and Judge Doyle resolved this question in her Findings of Fact.

Judge Doyle also singled out Ms. Debuys as credible in her opinion that the property division was "very skewed" and neither fair nor equitable. FOF 34, 35. The Judge found Mr. Wilson gave Mrs. Wilson "substantially all" of his assets at a time when he had little or no prospect of future earnings – something known to both Mr. and Mrs. Wilson. Their attorney confirmed that this transfer of substantially all assets to Mrs. Wilson was made

assuming a "worst case scenario" that would mean Mr. Wilson was going to jail for a long time. FOF 36.

> 9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

This was admitted and the trial court's finding to this effect was not assigned error by Mrs. Wilson.

> 10. The transfer occurred shortly before or shortly after a substantial debt was incurred;

The days between arrest, threat of suit, and transfer of assets were incredibly few.

**E. Constructive Fraud As To Present Creditors under §19.40.051(a) And As To Present And Future Creditors Under 23 §19.40.041(a)(2).**

The trial court further concluded that Andrew Clayton had proven Constructive Fraudulent Transfer as to present and future creditors under RCW 19.40.041(a)(2) and Constructive Fraudulent Transfer as to present creditors under RCW 19.40.051(a). Both claims involve similar, though not identical elements.

RCW 19.40.041(2)(ii) declares transfers are fraudulent

- as to present and future creditors
- where the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and

- the debtor believed or reasonably should have believed that he would incur debts beyond his ability to pay as they became due.

RCW 19.40.051(a) declares transfers are fraudulent

- as to present creditors
- where the debtor did not receive reasonably equivalent value in exchange for the transfer and
- the debtor was insolvent at that time or became insolvent as a result of the transfer.

Mrs. Wilson claims judgment under both statutes must be reversed because Andrew Clayton did not provide substantial evidence that Mr. Wilson did not receive "reasonably equivalent value" for the assets he transferred to Mrs. Wilson.[19] She has made no other assignment of error for these holdings. However, since Mrs. Wilson has admitted Andrew Clayton was a present creditor and that Mr. Wilson was made insolvent by this transfer, there could be no other issue raised in regard to the trial court's holding there was constructive fraud.

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[19] Since property settlement agreements are governed by RCW 26.16.210 as held in *Jones*, *supra*, any fraudulent transfer claim related to a property settlement agreement arguably should be governed by that statute. If that follows, then Mr. and Mrs. Wilson also should carry the burden of proof to show that their property settlement agreement was not a fraudulent transfer under RCW 19.40.041(a)(2) and RCW 19.40.051(a). This would mean, for example, that the Wilsons bear the burden of proving that Mr. Wilson received "reasonably equivalent value" for the transferred assets—an element of both. It would be a very strange result to have RCW 26.16.210 apply to actual fraud but not to constructive fraud. This would mean actual fraud would be easier to prove than constructive fraud. However, since the trial court's conclusions are supported under either standard of review, the question probably need not be resolved here.

We refer the court to our discussion of "reasonably equivalent value" above.[20] The trial court found, with good and substantial basis in the record, that Mr. Wilson did not receive "reasonably equivalent value" for his transfer to Mrs. Wilson of substantially all of his personal and real property.

**F. Conclusive Common Law Fraud: Spousal Fraudulent Transfer.**

Conclusions of Law Nos. 13, 14, and 15 provide the fourth basis for holding the transfer of assets to Mrs. Wilson in 2002 fraudulent as to Andrew Clayton and other present creditors.

In Washington, it has long been the common law rule that where one spouse transfers assets to the other, and the transferring spouse is insolvent, "the act of transferring the property is conclusive evidence of fraud, and the intent is presumed from the act." Davison v. Hewitt, 6 Wn.2d 131, 135-6, 106 P.2d 733, 735-6 (1940).

In the face of "overwhelming evidence," defense counsel admitted both that Andrew Clayton was a creditor at the time of the transfer and that Mr. Wilson was insolvent as a result of his transfer of community property to Mrs. Wilson. FOF 38, 40.

Tegland's 1997 edition of Washington Practice presents this principle as current law:

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[20] § supra at pp. 34-37.

> "Washington law has always reflected a concern that spouses will make agreements in contravention of the rights of creditors...Due to this concern that spouses may use their agreements in an effort to avoid creditors, the following rules apply:
>
> 1. An agreement that transfers property from one spouse to the other, or reclassifies it (such as from community property to separate property), cannot affect the right of an existing creditor to reach that asset in the future if necessary to do so to collect upon the debt.
>
> 2. If the transferring spouse is insolvent, the agreement and transfer are void, irrespective of whether or not the motive was to defraud creditors. Fraudulent intent is conclusively presumed."

Washington Practice, Vol. 19, Ch. 15, §15.5 (1997).

**1. The UFTA Is Expressly Supplemented By Prior Common Law.**

RCW 19.40.902 states that prior principles of law relating to fraud and equity continue to supplement Chapter RCW 19.40 unless "displaced" by the provisions of the Chapter (emphasis supplied):

> **"Unless displaced by the provisions of this chapter, the principles of law and equity, including** the law merchant and **the law relating to** principal and agent, estoppel, laches, **fraud**, misrepresentation, duress, coercion, mistake, **insolvency**, or other validating or invalidating cause, **supplement its provisions." (emphasis added)**

*Freitag v. McGhie*, 133 Wn.2d 816, 947 P.2d 1186 (1997), for example, held that prior case law providing a one year discovery rule for fraudulent transfers supplemented the statute of limitations language of RCW 19.40.091(a). The statutory language does not include language

stating that the one year discovery rule applies to the discovery of fraudulent nature of the transfer. The *Freitag* court held that prior Washington law had found that both knowledge of the transfer *and of its fraudulent nature* were necessary to start the running of the statute of limitations. *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960).

**2. There Is No Provision In The UFTA "Displacing" Prior Law Relating To Transfers Between Spouses.**

RCW 19.40 et seq. has no specific provision dealing with transfers between husband and wife. The UFTA does consider "insider" transfers in general, but the definition of insider is broad and encompasses not only relatives, but partners, affiliates, officers, directors, etc. Finding this common law fraud supplements the UFTA is consistent with the legislature's particular concern with transactions between husband and wife as expressed in RCW 26.16.210.

**G. Does A Conclusion Of Fraudulent Transfer Automatically Set Aside A Dissolution Decree?**

Mrs. Wilson begins the Argument section of her opening brief in confusing fashion. She appears to allege the trial court set aside the decree of dissolution[21], but then acknowledges that the trial court specifically declined to do this.[22] It is clear from Judge Doyle's Conclusions of Law

[21] III(D) at p. 26.
[22] III(D) at p. 27.

that she was not setting aside the dissolution. For example, Conclusion of Law No. 9 states:

> 9. Mr. and Mrs. Wilson should be enjoined from any further disposition or encumbrance upon formerly community property distributed as part of their property settlement agreement and dissolution decree unless approved by further Order of this Court. Mr. and Mrs. Wilson may use available cash funds or the existing line of credit on the Kenmore residence to pay ordinary costs of daily living until Mr. Clayton's Judgment is satisfied.

Judge Doyle did find the transfers fraudulent under the UFTA and the common law and voided them accordingly. However, there is no authority indicating this voiding affects the division of property as between Mr. and Mrs. Wilson. The effect of the voiding of the transfers without modifying the dissolution is to limit the effect of the voiding to the nature and extent the assets are now reachable by creditors of the community.

There is an "equitable lien" involved in this process, but the equitable lien would be created if Andrew Clayton executed the Judgment on formerly community property owned by Mrs. Wilson where there was community and separate property owned by Mr. Wilson still available. Under *deElche*, Mrs. Wilson would have an equitable lien against Mr. Wilson to the extent of his non-exempt property. *deElche*, *supra*.

Other Washington cases finding fraudulent transfer between husband and wife have voided such transfers, ordered such property sold, and otherwise fashioned a remedy directed at the property transferred. See, e.g. *Davison v. Hewitt, supra* at 137. The law does not require a change in the dissolution agreement. The existence of the doctrine of the creation of an "equitable lien" in the non-tortfeasor spouse is that only remedy necessary to properly protect such a spouse. The issues raised by Mrs. Wilson in this respect are illusory. Her dissolution remains in place. The former community property, however, is reachable by creditors whether in her possession or in the possession of Mr. Wilson.

**H. The Trial Court Did Not Abuse Its Discretion In Denying Mrs. Wilson's Motion For Separate Trials.**

Trial courts have discretion to bifurcate issues into separate trials, however, such authority should be carefully and cautiously applied and utilized only in a case and at a juncture where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice. Piecemeal litigation is not to be encouraged. 4 Orland, Wash. Prac. 276; 2B Barron & Holtzoff, Federal Practice & Procedure s 943, at 187; 5 Moore, Federal Practice 42.03 (2d ed. Supp.1964); 88 C.J.S. Trial, §§8, 9. This is particularly true in litigation where issues are commingled and overlapping. 85 A.L.R.2d 9;

46 Iowa L.Rev. 815 (1960-61); 46 Minn.L.Rev. 1059 (1961-62); 48 Va.L.Rev. 99 (1962). *Brown v. General Motors Corp.*, 67 Wash.2d 278, 407 P.2d 461 (1965).

Courts are presumed to be able to listen to the evidence with an impartial and unbiased ear. *In re Harbert*, 85 Wn. 2d 719, 729, 538 P. 2d 1212 (1975); *State v Bell*, 59 Wn. 2d 338, 368 P. 2d 177 (1962). This was a trial to the court, not to a jury. There were good reasons of judicial economy to try both matters together. Mr. and Mrs. Wilson obviously were essential witnesses to all issues. Mr. Wilson was transported to trial from prison to testify. Similarly, the evidence relating to the nature of the sex abuse, both in extent and duration, was directly relevant to the fraudulent transfer claims since sex abuse claims against Mr. and Mrs. Wilson are proof of motive and the probable insolvency of Mr. Wilson resulting from the transfers. Although Mrs. Wilson may have denied knowledge of the full extent of the abuse, Mr. Wilson obviously knew of the abuse first hand and allegedly fully confessed to Mrs. Wilson before the transfer of assets.

Finally, the claim against the marital community arose from Andrew Clayton's employment doing yard work at the Wilson's home and at their rental and other properties. In the course of such testimony, the Wilson's important assets—their real property—would necessarily have been in

evidence even if the fraudulent transfer issues were tried separately. Thus, the point that Mrs. Wilson stresses, i.e. that bifurcation would have prevented the trier of fact from knowledge of the extent of the Wilsons' assets, is not correct. The trial court did not abuse its discretion.

## I. The Court's Damages Award Is Not Excessive And Is Supported By Substantial Evidence At Trial.

### 1. Standard of Review.

An appellate court's role in analyzing the size of jury verdicts is quite limited. An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice. *Washburn,* 120 Wash.2d at 268, 840 P.2d 860 (quoting *Bingaman v. Grays Harbor Comm'ty Hosp.,* 103 Wash.2d 831, 835, 699 P.2d 1230 (1985)). An appellate court "rarely" overturns a jury verdict on this basis; it can review only the written record, while the fact-finder and the trial judge were in the favored position of being able to evaluate the full range of evidence submitted. *Washburn,* 120 Wash.2d at 268, 840 P.2d 860 (citing *Bingaman,* 103 Wash.2d at 835, 699 P.2d 1230); *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wash.2d 15, 32-3, 864 P.2d 921(1993)

### 2. The Court's Damage Award Is Fully Supported By The Record.

Mrs. Wilson has assigned error to Conclusion of Law No. 7, but provides no argument or foundation in the record for why this Conclusion was error. This failure alone is sufficient to defeat the assignment of error, but we will briefly review the relevant facts.

The court's determination that emotional damages were $1,200,000 is fully supported by the record. FOF 15. We have noted some of the facts relevant to the award of general damages above. See Section II(B) *supra* at pages 6 to 11.

The trial judge heard all the evidence and observed the witnesses as they testified. Andrew Clayton was sexually assaulted by Mr. Wilson for almost seven years – from ages 10 to 16. He was fondled, masturbated, made to masturbate Wilson, subjected to oral sex , and required to perform oral sex on Wilson. The abuse permeated all aspects of his life including limiting Andrew's normal development of childhood friends. Andrew's childhood was marred by apprehension, fear, guilt, shame, loss of self-confidence and self-esteem. His personality was permanently altered by the abuse. Because of the abuse, Andrew will endure a life time of damaged self-esteem, lowered sense of self-efficacy, propensity to be apprehensive, worry, propensity to make mistakes, and hypersensitivity to

onset of anxiety in response to stress. Treatment may ameliorate some of his symptoms but will not nullify or alter the fundamental alteration that has occurred in Andrew's personality.

### 3. Future Wage Loss Also Is Fully Supported By The Record. FOF 22.

Dr. Wheeler testified Andrew's psychological functioning in the work place has been compromised causing a lack of self –confidence, fear of making mistakes, difficulty in advocating for himself of asserting himself, and difficulty working due to acute symptoms of anxiety. RPIV 114, 184.

Cloie Johnson, a vocational rehabilitation counselor and case manager, assessed the impact of Andrew's injuries on his capacity to work. RPVI 7, 12. Capacity to work is the ability to take ones' skills, education, and experience to the work force to out-compete one's peers, produce work and earn money. The three areas one needs to perform and be successful are ability to produce, quality of work produced, and ability to interact with others in the workplace. RPVI 14. The manifestations of an injury affect a person's capacity to work. RPIV 15.

Ms. Johnson determined that Andrew's capacity to work has been permanently compromised by his injury. She concluded on a more likely than not basis the manifestations of Andrew's injury as related by

Dr. Wheeler would interfere on a daily basis with his ability to produce work, the quality of his work, and his ability to interact with others as related to work. RPVI 19, 21. Pre-injury Andrew had the capacity to earn the wages of a successful journeyman plumber. RPVI 81. Journeyman plumbing, the high end of plumbing, requires attention to detail, concentration, producing high quality work, taking orders, follow through, and initiative. Andrew's impairments as related by Dr. Wheeler, interfere with those necessary qualities. His injury has resulted in a lack of self-confidence, fear of making mistakes, difficulty advocating for himself and asserting himself in the world of work. As a plumber he will struggle. He will have a hard time advocating for himself and being assertive. Because of the acute symptoms of anxiety, he will have difficulty working. RPIV 114, 184. Andrew's anxiety makes it difficult to concentrate, and because of his impairments he requires supervision. RPVI 20, 21.

Testimony was presented that supports a future wage loss up to $1,500,000. RPVI 130. Ms. Johnson's best-case scenario with successful treatment is Andrew would remain at his current entry level of plumbing without problems or interruption with earnings. This level was half that earned by a journeyman plumber, equating to a future wage loss of about $1,000,000. RPVI 21-2, 54, 64. The worst-case scenario for Andrew

according to Ms. Johnson's assessment is he would not continue in his vocation and would be relegated to entry level positions that involve rote, repetitive work comparable to the job he held after high school, that pay at a rate of $8 to $10 per hour, which equates to a future wage loss of $1,260,000. Economist Robert Moss calculated the present value future wage loss to Andrew based on Ms. Johnson's assessment and statistical data regarding work life expectancy and pay rates. RPVI 92, 94, 95-7, 98-9, 100, 103-4, 130.

The court thus was presented with substantial evidence that Andrew's capacity to work had been negatively impacted and would result in a future wage loss. A future wage loss of $200,000 was well within the amounts to which were testified, and is supported by the record. Exact prediction of future wage loss is not possible RPVI 101.

**4. There Is Substantial Evidence Supporting The Court's Determination Of Past And Future Medical Expenses.**

The court's Conclusion of Law No. 7 awarding future medical expenses of $14,200 is supported by the testimony of Dr. Wheeler, Ms. Johnson, and Mr. Moss. RPIV 141, 142, 155, 190; RP III 104, RP III 30.

The court's determination of past medical expenses of $4,024.50 is supported by Exhibit 57, admitted without objection. RPV 93.

## IV. CONCLUSION

For the foregoing reasons, the Findings of Fact and Conclusions of Law and Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of July, 2007.

SCHROETER, GOLDMARK & BENDER

KATHRYN GOATER, WSBA# 9648
JAMES D. HAILEY, WSBA #7639
Counsel for Respondent
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

# APPENDIX A

## Appendix A
## VERBATIM REPORT OF PROCEEDINGS DESIGATIONS – BY PARTY

| Date of Trial | Designation of Report of Proceedings By Party | Witness or Event | Page Numbers in RP |
|---|---|---|---|
| 12/07/05 | Andrew **Clayton** cites as **RPI**<br>Mary Kay **Wilson** cites as **1RP** | Motions in Limine | 1 – 70 |
| 12/08/07 | Andrew **Clayton** cites as **RPII**<br>Mary Kay **Wilson** cites as **2RP** | Motions in Limine | 1 – 71 |
| 12/09/05 | Andrew **Clayton** cites as **RPIII**<br>Mary Kay **Wilson** cites as **3RP** | Opening Statements<br>Janette Luitgaarden | 1 – 64<br>65 – 77 |
| 01/03/06 | Andrew **Clayton** cites as **RPIV**<br>Mary Kay **Wilson** cites as **3RP** | Dr. Robin Sloane<br>Andrew Clayton<br>Robert Wheeler | 7 – 32<br>37 – 95<br>96 - 192 |
| 01/04/06 | Andrew **Clayton** cites as **RPV**<br>Mary Kay **Wilson** cites as **4RP** | John Lennon<br>Jessica Singh<br>John Clayton<br>Victoria Smith | 5 – 58<br>73 – 98<br>98 – 117<br>118 - 194 |
| 01/05/06 | Andrew **Clayton** cites as **RPVI**<br>Mary Kay **Wilson** cites as **5RP** | Mary Kay Wilson<br>Cloie Johnson<br>Robert Moss<br>Crystal Clayton<br>Andrew Clayton | 3 – 5<br>6 – 88<br>89 – 134<br>135 – 167<br>167 - 199 |
| 01/09/06 | Andrew **Clayton** cites as **RPVII**<br>Mary Kay **Wilson** cites as **6RP** | Douglas Wilson | 4 – 113 |
| 01/10/06 | Andrew **Clayton** cites as **RPVIII**<br>Mary Kay **Wilson** cites as **7RP** | Linda Hamilton<br>Judy Filibeck<br>Douglas Wilson<br>Janice Reha<br>Mary Kay Wilson | 16 – 22<br>23 – 55<br>56 – 98<br>99 – 164<br>165 - 205 |
| 01/11/06 | Andrew **Clayton** cites as **RPIX**<br>Mary Kay **Wilson** cites as **8RP** | Roland Nelson<br>Mary Kay Wilson<br>Judge Anthony Wartnik<br>Mabry DeBuys | 3 – 87<br>88 – 140<br>141 – 201<br>204 – 254 |
| 01/12/06 | Andrew **Clayton** cites as **RPX**<br>Mary Kay **Wilson** cites as **9RP** | Mary Kay Wilson | 3 – 13 |